

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

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5 DOUGLAS ADAMS and TRINA ADAMS,
husband and wife,

6 Plaintiffs,

7 v.

8
9 LUANNE C. TUNMORE and JOHN DOE
10 TUNMORE, wife and husband, and
the CONFEDERATED TRIBES OF THE
11 COLVILLE RESERVATION,

12 Defendants.

13 No. CV-05-270-FVS

14
15 ORDER GRANTING MOTION FOR
CERTIFICATION

16
17 **THIS MATTER** comes before the Court for consideration of
Defendants' motion for certification. Plaintiffs are represented by
Thomas Janisch. Defendants are represented by Everett Coulter, Jr.
The United States is represented by Pamela DeRusha.

18 **I. BACKGROUND**

19 This action involves a claim for damages stemming from a motor
vehicle accident between Plaintiff Trina Adams and Defendant Luanne
20 Tunmore on August 8, 2002. The accident occurred on a state highway
21 in Omak, Washington. At the time of the accident, Ms. Tunmore was
22 employed as a Jesuit Volunteer at the Pascal Sherman Indian School
23 ("PSIS"), which is operated by the Confederated Tribes of the
24 Colville Reservation (hereinafter "Colville Tribe") pursuant to a
25 grant from the United States Department of Interior, Bureau of Indian
26 Affairs ("BIA") under the authority of Public Law 100-297, known as

1 the Tribally Controlled School Act of 1988 ("TCSA"), codified at 25
2 U.S.C. §§ 2501-2511. PSIS also receives funding from (1) the Omak
3 School District, via the state of Washington; (2) grants from both
4 the state of Washington and the BIA; (3) the Colville Tribe; and (4)
5 private fund-raising.

6 At the time of the vehicle accident, Ms. Tunmore was driving a
7 car owned by the Colville Tribe on her way "to Omak to finish up
8 preparations for leaving the Colville Reservation." The vehicle was
9 assigned to PSIS for school use and Ms. Tunmore was authorized by
10 PSIS to drive the vehicle. For her work at PSIS, Ms. Tunmore
11 received a monthly stipend of approximately \$78.00. Her duties at
12 PSIS included "assisting students with reading, art, and poetry" and
13 working with "PSIS' soccer program."

14 **II. PROCEDURAL HISTORY**

15 Plaintiffs originally filed this action in Okanogan County
16 Superior Court, asserting claims for negligence against Ms. Tunmore
17 and vicarious liability against the Colville Tribe. Defendants
18 removed the action to federal court pursuant to 28 U.S.C. § 1442.
19 Plaintiffs sought a remand under RCW 37.12.010(8), which allows the
20 State of Washington to exercise jurisdiction over a negligence action
21 for damages arising from a vehicle accident on a state highway. The
22 Court denied the motion to remand on the basis that if, at the time
23 of the incident, Ms. Tunmore was acting within the course and scope
24 of her employment pursuant to a TCSA Grant, she would be considered a
25 federal employee for purposes of the Federal Tort Claims Act ("FTCA")
26 and the Court would have original jurisdiction over this action.

1 When the Court denied Plaintiffs' motion to remand, Plaintiffs
2 submitted an administrative claim with the Department of Interior
3 pursuant to 28 U.S.C. § 2675. Ms. Tunmore submitted a separate
4 request with the Department of Interior for certification that she
5 was acting within the scope of her employment at the time of the
6 accident. Before the Department of Interior responded to the
7 administrative claim and the request for certification, Defendants
8 filed a motion for summary judgment with this Court, requesting (1)
9 dismissal of all claims against the Ms. Tunmore and the Colville
10 Tribe and substitution of the United States as the proper party
11 defendant; or (2) certification pursuant to 28 U.S.C. § 2679(d)(3)
12 that Ms. Tunmore was an employee of the PSIS and was acting within
13 the scope of her employment at the time of the incident. The Court
14 granted the United States' request for a continuance pending an
15 official response from the Department of Interior as to Ms. Tunmore's
16 request for certification.

17 The United States denied certification to Ms. Tunmore that she
18 was acting as a federal employee within the scope of her employment
19 with PSIS under a TCSA Grant, thereby denying Defendants coverage
20 under the FTCA. In response, the Court entered an order explaining
21 that the Court would construe Defendants' pending motion for summary
22 judgment and motion for substitution as a petition for certification
23 pursuant to 28 U.S.C. § 2679(d)(3).

24 **III. STANDARD OF REVIEW**

25 Pursuant to 28 U.S.C. § 2679(d)(3), the Court has jurisdiction
26 to review the United States' denial of certification. The denial of

1 certification is subject to *de novo* review in both the district court
2 and on appeal. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993). The
3 party seeking review of the denial of certification bears the burden
4 of presenting evidence and disproving the decision by a preponderance
5 of the evidence. *Id.*

6 **II. DISCUSSION**

7 If certification is given in a civil action, the Federal
8 Employees Liability Reform and Tort Compensation Act of 1988, which
9 amended the FTCA, requires substitution of the United States as
10 defendant, in lieu of the federal employee defendant, which leaves
11 the plaintiff with a single avenue of recovery, the FTCA. *Green*, 8
12 F.3d at 698 (citing 28 U.S.C. §§ 1346, 2671 et seq., 28 U.S.C. §
13 2679(d) (4)). The FTCA grants exclusive jurisdiction to district
14 courts for a claim against the United States for torts committed by
15 federal employees while acting within the scope of employment. 38
16 U.S.C. § 1346(b) (1); *Williams v. United States*, 350 U.S. 857, 76
17 S.Ct. 100, 100 L.Ed. 761 (1955). To determine whether Ms. Tunmore is
18 covered under the FTCA, the Court must address first whether Ms.
19 Tunmore is deemed a federal employee for purposes of the FTCA, and
20 second whether she was acting within the scope of her employment at
21 the time of the incident. See *United States v. Orleans*, 425 U.S.
22 807, 814, 96 S.Ct. 1971, 1975, 48 L.Ed.2d 390 (1976) (stating the
23 FTCA "is a limited waiver of sovereign immunity, making the Federal
24 Government liable to the same extent as a private party for certain
25 torts of federal employees acting within the scope of their
26 employment"); 28 U.S.C. §§ 1346(b) and 2674.

1 **A. Federal Employee**

2 Congress extended the United States' liability under the FTCA by
 3 way of Public Law 101-512, which imposes liability upon the United
 4 States for the acts of tribal organizations and their employees
 5 administering a TCSA Grant. See *Mentz v. United States*, 359
 6 F.Supp.2d 856 (D.N.D. 2005); *Big Owl v. United States*, 961 F.Supp.
 7 1304, 1307 (D.S.D. 1997)). Public Law No. 101-512 provides, in
 8 relevant part:

9 **With respect to claims resulting from the performance of**
 10 **functions ... under a contract, grant agreement, or**
 11 **cooperative agreement authorized by the ... Tribally**
 12 **Controlled School Grant of the Hawkins-Stafford Elementary**
 13 **and Secondary School Improvement Amendments of 1988, ... an**
 14 **Indian tribe, tribal organization or Indian contractor is**
 15 **deemed hereafter to be part of the Bureau of Indian Affairs**
 16 **in the Department of the Interior ... while carrying out**
 17 **any such contract or agreement and its employees are deemed**
 18 **employees of the Bureau or Service while acting within the**
 19 **scope of their employment ... any civil action or**
 20 **proceeding involving such claims brought hereafter against**
 21 **any tribe, tribal organization, Indian contractor or tribal**
 22 **employee covered by this provision shall be deemed to be an**
 23 **action against the United States and will be defended by**
 24 **the Attorney General and be afforded the full protection**
 25 **and coverage of the Federal Tort Claims Act[.]**

26 Public Law No. 101-512, Title II, § 314, Nov. 5, 1990 (codified at 25
 27 U.S.C. § 450f Note, Historical and Statutory Notes) (emphasis added).
 28 Under Public Law 101-512, employees of a school operated under a TCSA
 29 Grant are considered employees of the BIA and can be sued under the
 30 FTCA. Therefore, if, at the time of the incident, Ms. Tunmore was an
 31 employee of the PSIS performing functions under the TCSA Grant, Ms.
 32 Tunmore is considered a federal employee for purposes of the FTCA.

33 The United States argues Ms. Tunmore should not be considered a
 34 federal employee because her stipend was not paid by specific money

1 received under the TCSA Grant. For her work at PSIS, Ms. Tunmore
2 received a monthly stipend of approximately \$78.00 from PSIS.
3 Although Ms. Tunmore was employed to work for the PSIS, her salary
4 was paid from the Colville Tribe's "General Fund" because the PSIS
5 maintains separate funding for teachers who come from religious
6 organizations to volunteer and work at PSIS. The United States
7 argues this shows Ms. Tunmore was not hired pursuant to the TCSA
8 Grant and, consequently, she was not performing functions under the
9 Grant at the time of the incident.

10 Nothing in Section 314 of Public Law 101-512 addresses the issue
11 of a stipend paid by a tribe that is operating a school under a TCSA
12 Grant. Rather, Section 314 addresses the "performance of functions"
13 under the Grant. According to the TCSA Grant between the BIA and the
14 Colville Tribe, the purpose of the Grant is to allow the Colville
15 Tribe and the PSIS to "defray expenditures, for education related
16 activities[.]" (Ct. Rec. 13, at 7). "Such expenditures include, but
17 are not limited to: School Operations, Academic, Educational,
18 Residential, Guidance and Counseling, and Administrative Purposes,
19 and Support Services for the schools, including Transportation[.]"
20 *Id.* at 8. Specifically, the declaration of Michael Smith, submitted
21 by the United States, shows that the TCSA Grant at issue here
22 provided \$1,045,100 to be used for the education of Indian children.
23 Thus, one of the functions of the Grant is the education of children
24 at PSIS. Ms. Tunmore was hired to educate the children at PSIS.
25 Specifically, her duties at PSIS included "assisting students with
26 reading, art, and poetry" and working with "PSIS' soccer program."

1 Pursuant to Public Law 101-512, the Colville Tribe is deemed
2 part of the BIA while carrying out the TCSA Grant. Ms. Tunmore is
3 deemed an employee of the BIA because she was employed to educate
4 children at the PSIS, which is operated by the Colville Tribe
5 pursuant to a TCSA Grant. See e.g., *Mentz*, 359 F.Supp.2d at 859-60
6 (finding employees of school operating under TCSA Grant to be
7 employees of the BIA and can be sued under FTCA); *Big Owl v. United*
8 *States*, 961 F.Supp. 1304, (D.S.D. 1997) (finding school board members
9 of a school operated pursuant to a TCSA grant to be employees of the
10 BIA and can be sued under FTCA). The source of Ms. Tunmore's stipend
11 is legally immaterial to whether Ms. Tunmore was performing functions
12 under a TCSA Grant. See e.g., *Big Crow v. Rattling Leaf*, 296
13 F.Supp.2d 1067, 1070 (D.S.D. 2004). For purposes of the FTCA, the
14 Court determines Ms. Tunmore is considered a federal employee because
15 at the time of the incident she was an employee of the PSIS
16 performing functions under the TCSA Grant. The remaining issue is
17 whether Ms. Tunmore was acting within the scope of her federal
18 employment at the time of the incident.

19 ***B. Scope of Employment***

20 The scope of employment is determined by the law of the state
21 where the tort occurred. *Green*, 8 F.3d at 698. In this case,
22 Washington law controls the scope of employment issue because the
23 accident occurred on a Washington state highway. The test in
24 Washington for determining whether an employee was acting within the
25 course and scope of employment at a certain time is "whether the
26 employee was, at the time, engaged in the performance of the duties

1 required of him by his contract of employment; or by specific
2 direction of his employer; or, as sometimes stated, whether he was
3 engaged at the time in the furtherance of the employer's interest."
4 *Thompson v. Everett Clinic*, 71 Wash. App. 548, 552, 860 P.2d 1054,
5 1057 (Div. 1, 1993) (citing *Dickinson v. Edwards*, 105 Wash.2d 457,
6 467, 716 P.2d 814 (1986)). The emphasis is on the benefit to the
7 employer rather than on the control or involvement of the employer.
8 *Dickinson*, 105 Wash.2d at 467, 716 P.2d at 819. Under ordinary
9 circumstances, an employee is not acting in the course of employment
10 while going to or from the employer's place of business.
11 *Westinghouse Elec. Corp. v. Dep't of Labor and Indus.*, 94 Wash.2d
12 875, 621 P.2d 147 (1980) (citations omitted). The exception to the
13 general "coming and going" rule is that an employee is in the course
14 and scope of employment while going to or from work in a vehicle
15 furnished by the employer as an incident to employment pursuant to
16 custom or contractual obligation, either express or implied. *Id.*
17 (citation omitted).

18 Here, the record reveals Ms. Tunmore was furnished a vehicle by
19 PSIS. At the time of the incident, Ms. Tunmore was authorized by the
20 Superintendent of PSIS to be driving the vehicle. Specifically, Ms.
21 Tunmore was driving the vehicle on her way "to Omak to finish up
22 preparations for leaving the Colville Reservation." The Court
23 concludes this situation falls within the exception to general
24 "coming and going" rule in Washington. Ms. Tunmore was clearly
25 acting within the course and scope of her employment when she was
26 involved in the motor vehicle accident on August 8, 2002.

CONCLUSION

Pursuant to 28 U.S.C. § 2679(d), the Court certifies that Defendant Luanne Tunmore was acting in the course and scope of her federal employment at the time of the vehicle accident on August 8, 2002. Defendants' petition for certification is granted and the United States is substituted as the party defendant. Accordingly,

IT IS HEREBY ORDERED:

1. Defendants' Motion for Certification (**Ct. Rec. 26**) is
GRANTED.

2. The **United States** is **substituted** for Luanne Tunmore, John Doe Tunmore, and the Confederated Tribes of the Colville Reservation **as the proper party defendant** in this action.

3. Defendants' Motion for Summary Judgment (**Ct. Rec. 26**) and Motion to Substitute Party (**Ct. Rec. 26**) are **MOOT** in light of the Court's prior Order explaining that Defendants' Motion for Summary Judgment and Motion for Substitution would be treated as a petition for certification to this Court. (Ct. Rec. 49).

RESOLVED and should be terminated from the pending motion calendar.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 8th day of September, 2006.

s/Fred Van Sickle
Fred Van Sickle
United States District Judge